May 23, 2005

MYTH: Even if filibusters were not used, judicial nominations have always needed at least 60 votes to be confirmed — just as a matter of practice.

FACT: False. The Senate has always viewed the constitutional standard for confirmation to be a simple majority. For example, the following Carter and Clinton judges were confirmed with fewer than 60 votes:

Richard A. Paez (9th Cir.), confirmed, 59-39, on Mar. 9, 2000
William A. Fletcher (9th Cir.), confirmed, 57-41, on Oct. 8, 1998
Susan O. Mollway (D. Hawaii), confirmed, 56-34, on June 22, 1998
Abner Mikva (D.C. Cir.), confirmed, 58-31, on Sept. 25, 1979
L. T. Senter (N.D. Miss.), confirmed, 43-25, on Dec. 20, 1979

Editorial

"Filibuster showdown: Judges & stakes," Pittsburg Tribune Review, 5/22/05

"Senate majorities and judicial nominees," Washington Times, 5/22/05

In The News

"Judge's past belies present criticisms," Washington Times, 5/22/05

"Frank: No nukes on Hill! Reverses '93 filibuster stand," Boston Herald, 5/22/05

"Objections have no basis," Atlanta Journal Constitution, 5/22/05

Filibuster showdown: Judges & stakes, Pittsburg Tribune Review, 5/22/05
The showdown on appeals court nominee Priscilla Owen may be a crucial moment in this nation's history.

If the GOP -- by a majority vote and as early as Tuesday -- exercises the "nuclear" or "constitutional option" to end Democrat filibusters of "extremist" judicial candidates for our federal courts, the savaging of our economic liberty and constitutional law will, we hope, have seen its high mark.

The full Senate would vote yea or nay on the Texas Supreme Court justice, discharging its constitutional duty.

Judge Owen, a law school honors graduate with a powerful intellect, is indeed pro-business and would require minors seeking abortions to consider most gravely their decision and refrain from telling their parents only in the most severe circumstances. These views are seen by her opponents as extremism. We see them as core American values.

Owen would be followed on the Senate floor by California Supreme Court Justice Janice Rogers Brown. An-up-by-her-bootstraps daughter of sharecroppers, Ms. Brown likewise is blessed by brain power. As a conservative who once called the Supreme Court's sustaining of the New Deal "a triumph of our own socialist revolution," she is particularly problematic for government *uber alles* Democrats.

Her confirmation to the D.C. circuit, which hears the most federal regulation cases, might let a little air pass through the lips of a private sector choking on regulatory excess.

FDR has been winning for 70 years. The GOP should win this one for the Gipper.

“Senate majorities and judicial nominees,” Washington Times, 5/22/05

The culmination of the battle between Democrats and Republicans over the future of the federal judiciary, particularly at the appellate-court and Supreme Court levels, is likely to occur in one form or another by Tuesday. On that day the Senate could trigger the so-called nuclear option by using a simple-majority vote to ban filibusters of judicial nominees.

During 2003 and 2004, in an unprecedented, systematic use of the tactic, Democrats wielded the filibuster, which requires 60 votes to stop, to deny up-or-down votes for 10 nominees to the increasingly powerful U.S. Circuit Courts of Appeal. The Republicans' majority during the 108th Congress, narrow though it was, nonetheless was sufficiently united to guarantee the confirmation of each of those nominees in an up-or-down vote that was denied them.

In the 2004 election, Republicans increased their majority in the current 109th Congress to 55 members. With 60 votes needed to stop a filibuster, however, that is still not enough to overcome a united front by the Democrats, who have pledged to use the filibuster as relentlessly in the 109th as they did in the 108th. There is no doubt the Democrats would use the tactic for a Supreme Court nominee.

A vote to ban the filibuster for judicial nominees has been called the "nuclear option," because it threatens to blow up whatever comity remains in the Senate and because Democrats promise to retaliate by tying the Senate into parliamentary knots. As a prelude to the imminent showdown, it is worth considering several important trends.

The first relevant trend compares the success presidents (elected and re-elected) have had during the last three decades in securing Senate confirmation of circuit-court

nominees in the first two-year Congress during which the Senate was controlled by the president's party. During the 95th Congress (1977-78), according to the Congressional Research Service (CRS), the Democratic-controlled Senate confirmed 100 percent (12/12) of Jimmy Carter's circuit-court nominees.

During the 97th Congress (1981-82), the CRS reported that the Republican-controlled Congress confirmed 95 percent (19/20) of Ronald Reagan's circuit-court nominees. After Mr. Reagan was re-elected, Republicans retained control of the Senate, which, according to the CRS, confirmed 100 percent of Mr. Reagan's appellate-court nominees during the 99th Congress (1985-86).

Democrats regained control of the Senate in the 1986 elections, and retained control throughout the administration of President George H.W. Bush, who was elected in 1988. Bill Clinton won the presidency in 1992, and Democrats continued to control the Senate during the 103rd Congress (1993-94), during which 86.4 percent (19/22) of Mr. Clinton's nominees to the circuit courts were confirmed. Interestingly, the nominees who were not confirmed by the 103rd's Democratic-controlled Senate were later confirmed by the Senate in the 104th Congress, which was controlled by Republicans. Thus, 100 percent of Mr. Clinton's circuit-court nominations during the 103rd Congress eventually were confirmed. Having gained control in the 1994 elections, the GOP maintained control of the Senate throughout the balance of the Clinton administration.

When George W. Bush entered the White House in 2001, Republicans still controlled the Senate. But a defection from the party by Sen. Jim Jeffords of Vermont in May 2001, the same day that Mr. Bush released his first slate of circuit-court nominees, effectively turned control of the Senate over to the Democrats. Republicans regained control of the Senate in the 2002 election. Thus, for all practical purposes, the Senate in the 108th Congress (2003-04) was the first time Mr. Bush had a GOP-controlled body to consider his circuit-court nominations. According to the CRS, the Republican-controlled Senate in the 108th Congress managed to confirm only 52.9 percent (18/34) of Mr. Bush's circuit-court nominees.

Thus, the first important trend shows the following appellate-court-nomination success rates achieved by presidents for the first Senate controlled by their party following the president's election and re-election: Mr. Carter (100 percent); Mr. Reagan (95 percent, 100 percent); Mr. Clinton (100 percent, de facto); G.W. Bush (52.9 percent).

The second trend illustrates why circuit-court nominees became the target of 100 percent of Democratic filibusters during the 108th Congress. Circuit courts of appeal have long been the final decision-makers for the vast majority of federal cases. That is because the Supreme Court declines to hear more than 99 percent of the appeals that come before it. Thus, virtually all of circuit-court decisions not only become the established law throughout their individual circuits, but this has become increasingly so during the past two decades. Why? Because the signed opinions of the Supreme Court have declined from 152 during its 1982-83 term to 107 (1991-92 term) to 71 (2002-03) and 73 (2003-04).

The third trend reveals why the circuit-court filibusters represent an important prelude to the real battle, which will involve one, and probably several, appointments to the Supreme Court. Today the average age of the nine Supreme Court justices is more than 71 years old. That average is now higher than the average age at which justices have retired over the past century. Moreover, the Supreme Court has not had a vacancy since

August 1994, when Stephen Breyer joined the court. Indeed, George W. Bush is only the second president to serve at least one full term without appointing a Supreme Court justice. (Mr. Carter was the first.) Also, Mr. Clinton, who appointed two justices during the Democratic-controlled 103rd Congress (1993-94), made no subsequent appointments. As a result, the current, and counting, 10-year-nine-month period without a vacancy closely approaches the record period without a vacancy. That was 11 years, seven months. It ended in September 1823, more than 180 years ago. (And the court had only seven members back then.)

The final trend worth considering involves the results of the last several elections. Democrats haven't won the White House since 1996. The last time Democrats emerged from national elections with a majority in the Senate was 1992. On election night in all subsequent elections, Republicans achieved majority status in the Senate. Recall that the Democratic majority (June 2001-December 2002) occurred only after Mr. Jeffords left the Republican Party.

In its May 18 editorial, "Nuclear Disarmament," The Washington Post offered a recommendation to defuse the current battle over filibustering judicial nominees. As an alternative to the "nuclear option," The Post said the Republicans "could advocate rules that would guarantee swift committee hearings and up-or-down votes starting in 2009, when nobody knows which party will control the Senate or the White House." Reviewing the election results described above, we could not disagree more.

In this case, we agree with Chris Matthews of "Hardball": Democrats could solve the dilemma that the "nuclear option" poses for them by winning a few more elections.

Frank: No nukes on Hill! Reverses '93 filibuster stand
Boston Herald
By Andrew Miga
Sunday, May 22, 2005

WASHINGTON - U.S. Rep. Barney Frank, who publicly crusaded against Senate filibusters 12 years ago, now says he opposes banning filibusters against judicial nominees - the so-called ``nuclear option'' fueling a bruising Capitol Hill showdown.

``I would vote against changing the filibuster rule right now,'' Frank (D-Newton) told the Herald in a telephone interview Thursday. Frank explained he still supports an ``across-the-board'' ban against all filibusters, but he opposes the Republican ``nuclear option'' because it only outlaws filibusters against judicial nominees.

``I object to (a filibuster ban) being used in a very specific instance,'' Frank said. ``If they make an improvement going forward, I would maybe look at it differently.''

Frank's comments come as the Senate braces for a showdown vote over President Bush's filibustered judicial picks, a battle that could affect federal justices from the district level all the way to the next Supreme Court nominee.

In 1993, Frank led a public fight to end Senate filibusters, asserting in a Washington Post op-ed piece: ``I believe legislative bodies should scrupulously abide by two

principles: complete openness and majority rule. The filibuster is a godsend to potential gridlockers."

Republicans at the time were using filibusters to block President Clinton's agenda in the Democratic-controlled Senate. Today, it is frustrated Democrats in the GOP-run Senate who are using filibuster tactics to block Bush's judicial nominees, whom they consider to be too conservative.

The time-honored Senate practice of the filibuster, whereby lawmakers can block a nominee or a bill by refusing to stop debating, has sparked acrimony on Capitol Hill expected to reach a climax this week. Sixty of 100 Senate votes are required to kill a filibuster.

Republicans, who accuse Democrats of blocking Bush's judge picks for sheer partisan advantage, want a straight up-or-down majority vote on the president's court picks. Their bill would outlaw filibusters against judicial nominees.

Frank scoffed at Republican claims Bush is being unfairly shortchanged on nominees.

The Newton Democrat recalled the nomination of former Bay State Gov. William F. Weld to be ambassador to Mexico. GOP senators blocked a vote on Weld because they questioned his conservative credentials. ``Why didn't the Republicans apply the same standard to Bill Weld?" Frank asked.

The Washington Times

Judge's past belies present criticisms

By Charles Hurt

THE WASHINGTON TIMES

Democrats have attacked California Supreme Court Justice Janice Rogers Brown -- the second filibustered judicial nominee being debated in the Senate -- for several of her court rulings but also for speeches in which she criticized big government and defended religion.

President Bush nominated Justice Brown to the U.S. Court of Appeals, D.C. Circuit, nearly two years ago and the criticisms of her today mirror those leveled against her during her October 2003 confirmation hearing. But even her harshest critics do not deny that Justice Brown's accomplishments have been significant.

Born to sharecroppers in Greenville, Ala., under oppressive Jim Crow laws, Justice Brown told senators that her family's motto growing up was: "Don't snivel." As a single mother, she worked her way through law school and -- after holding a variety of legal positions in California -- was appointed to the state's highest court.

In 1998, the last time her name appeared on the California ballot, she won 76 percent of the vote -- higher than any other justice whose name was on the ballot that year.

Senate Democrats charge that Justice Brown is so conservative that she is too far outside the mainstream to serve on the second-highest court in the land. Several have accused Justice Brown, who is black, of being against civil rights and in favor of returning the country to a century dominated by the slavery of blacks.

"Janice Rogers Brown's record shows a deep hostility to civil rights, to workers' rights, to consumer protection, to a wide variety of government actions, the very issues that dominate the D.C. court," Sen. Edward M. Kennedy, Massachusetts Democrat, said on

the floor last week.

Minority Leader Harry Reid said, "She wants to take American back to the 19th century and undo the New Deal, which includes Social Security and vital protections for working Americans -- like the minimum wage."

Mr. Reid's assertion, which Justice Brown has said is flatly untrue, is based on a speech in which she said the New Deal marked "the triumph of our own socialist revolution."

During her October 2003 hearing, Justice Brown said most of her speeches were delivered to younger audiences such as law students in academic environments. "In making a speech to that kind of audience, I'm really trying to stir the pot a little bit, to get people to think, to challenge them a little bit and so that's what that speech is designed to do," she said. "But I do recognize the difference in the role between speaking and being a judge."

An area of possibly even greater alarm for Democrats is Justice Brown's suspicion of enlarged government, which supporters say is understandable for someone who grew up under government-sanctioned racism.

"I'm very concerned about your statements that you've made in your speeches which are highly critical of the role of government," Mr. Kennedy said during her confirmation hearing, noting that the D.C. Circuit hears many cases dealing with the federal government. "These issues have real implications for real people, and they are government actions that are out there to protect people."

"I don't hate government," she replied. "I am part of government. What I am talking about there is really where the government takes over the roles that we used to do as neighbors and as communities and as churches. I think it's important for us to preserve civil society, but I am not saying there is no role for government."

Mr. Kennedy also expressed concern about a case Justice Brown handled involving racial slurs in the workplace and scolded her for not being more concerned about such behavior. Justice Brown wrote that the First Amendment guarantees free speech and prohibits the federal government from ordering a supervisor not to use racial slurs.

"How does that possibly advance the cause of justice and fulfill what we were trying to do to deal with this kind of verbal harassment in the civil rights laws?" Mr. Kennedy asked.

"Well, Senator," Justice Brown replied, "Let me say that I absolutely agree with you that no one should be subjected to this kind of harassment, to verbal slurs. ... All that I was saying in that case is that the damages remedy is a deterrent. I think that damages in this particular case would be totally effective because you're dealing with this corporation that is not going to want to go through this continually."

Objections have no basis
The Atlanta Journal Constitution
by Jim Wooten editorial writer
Published on: 05/22/05

U.S. Sen. Johnny Isakson nails it.

"With the exception of arbitrary or vague statements like 'not being in the mainstream,' they haven't made any specific arguments against the qualifications of these seven judicial nominees," he says of Democratic efforts to prevent confirmation of President Bush's appellate court nominees.

In fact, says Isakson (R-Ga.), Senate Democrats have "gone so far in their offers to say 'you pick any five you want to approve, and pick two we won't approve.' They want not to approve some just for general principles. This speaks volumes about the whole debate."

The end of this road is near. This week for certain will play out the next, but sadly not the last, chapter in the 5-year-old campaign to right what embittered Democrats see as the 2000 election wrong. *But for . . . Al Gore would be in his second term . . .*

In the partisan view, this illegitimate occupant has, at best, a marginal right to leave his imprint on the nation's courts, and no right to change the 5-4 majority on the U.S. Supreme Court, for neither is his "mandate."

The result, as this long partisan struggle has devolved, is this week's showdown when Senate Majority Leader Bill Frist (R-Tenn.) invokes what Democrats call the "nuclear option" and Republicans call the "constitutional option." Efforts at compromise have been directed more to fund-raising and future elections than to any honest attempt to identify individuals whose qualifications could be seriously questioned.

Certainly nobody could seriously question the superior qualifications of the two women who are up first, Texas Supreme Court Justice Priscilla Owen and California Supreme Court Justice Janice Rogers Brown.

If either belonged to the good-ol'-girls network that considers Emily's List contributions to be a validation of their ideological correctness — Emily's List being a financial support system for pro-abortion rights Democratic women — their superior qualifications and intellect would be heralded everywhere Birkenstocks gather.

But, shame of shame, the poor, misguided judges have drifted into a suspect class.

When Rogers writes, as she did in one passage that alarms the left, "The public school system is already so beleaguered by bureaucracy; so cowed by the demands of due process; so overwhelmed with faddish curricula that its educational purpose is almost an afterthought," liberals may be alarmed, but the passage strikes me as no more than a statement of present-day reality.

In fact, what either nominee has said or written that's been offered up as evidence that they are "out of the mainstream" refers, obviously, to a mainstream that has not been reflected in election results.

In both cases, they were certainly not thought to be out of the mainstream in their home states. Owen, in her last race, won 84 percent of the vote and was endorsed by every newspaper in Texas. Rogers won in California with 76 percent.

U.S. Sen. Saxby Chambliss (R-Ga.) defended both last week. The focus, he said, should be their legal knowledge and experience.

"The essential principle for picking a federal judge," he said, "should be their commitment to the law. We need judges who put the law before personal philosophy, ideology or politics. That is what separates the judiciary from the legislative branch."

When Owen and Rogers are allowed confirmation votes, both Chambliss and Isakson predict that they — and the five others being blocked by Democrats — will get 65-70 votes.

It is time to act. This president has been twice selected by the nation's voters. He has the right to nominees of his choice, unless individual cases can be made otherwise.

If those judges indeed prove to be "out of the mainstream," the nation will hand power to the other party. And, if Democrats in a fit of pique, wish to bring the Senate to a halt to make their case, that is their liberty.

But, as Isakson noted Thursday, that tactic has been tried. The backlash is why he's in Congress.

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